

Chapter 24

THE MAINTENANCE OF LAW AND ORDER IN MILITARY OPERATIONS

In international military operations States are obliged to cooperate in the maintenance of law and order.

24.01

1. The phrase 'maintenance of law and order' refers to a broad range of activities. In many cases the taking of positive steps to maintain law and order will involve responding to the commission of serious crimes against individuals and property, the suppression of such crimes, and the development of procedures for dealing with such crimes. However, the maintenance of law and order may not necessarily involve responding to criminal activity. A military force may, for example, need to control a public demonstration or require individuals to be disarmed. Neither of these situations may necessarily constitute crimes but may nonetheless be justified on the basis of security concerns. It is important to stress that the concept of the maintenance of law and order used here covers a broad range of activities. This range of activities may include peaceful measures such as the adoption of legislation and the development of military doctrine and training programmes extending through to operational use of lethal force to prevent serious crimes such as genocide, war crimes, and crimes against humanity. These obligations apply to States, international organizations and, in some circumstances, to non-State actors.

2. Whether specific positive steps to maintain law and order must be taken by forces involved in international military operations will depend upon a range of variable factors including: the nature of the suspected or actual activity; the source of the legal authority to undertake law and order functions; the express or implied functions mandated to the military force; force capability; and relations with the Host State or other law and order authorities. Irrespective of obligations to undertake specific maintenance of law and order functions, all forces involved in international military operations are obliged to cooperate in the maintenance of law and order responsibilities. Cooperation will often be required between forces involved in joint military operations, with forces and/or relevant national authorities of the Host State, and also with relevant international organizations, agencies, and bodies.

3. International legal obligations to cooperate in the maintenance of law and order in military operations arise from several sources including peremptory or *jus cogens*

norms, customary international law, bilateral and multilateral treaties, and Security Council resolutions. The precise scope of specific obligations to maintain law and order will vary depending upon the source of the obligation. For example, the obligation to maintain law and order in situations of military occupation is dependent upon the authority of the legitimate power passing into the hands of the occupant. In contrast, where the Security Council mandates a Force to undertake law and order functions, the fulfilment of those functions will require cooperation with the Host State. States parties to the Rome Statute have a treaty obligation to cooperate with the work of the International Criminal Court and that particular treaty obligation may well have implications for the conduct of military operations. Furthermore, States participating in joint military operations may take operational decisions to allocate specific law and order functions to one or more national contingents and other contingents will be obliged not to frustrate or obstruct the fulfilment of those functions.

4. One specific example arising from the deployment of the International Force for East Timor (INTERFET) illustrates the significance of cooperation in relation to law and order functions. The Office of the High Commissioner for Human Rights issued a *Note on Guidance for Multinational Peace-Keeping Force in East Timor on Preservation of Evidence*.¹ The High Commissioner explained that the note was based upon a range of sources including 'relevant United Nations standards and guidelines, investigation procedures of International Tribunals, and relevant established practice' on the investigation of serious crime scenes. In particular, the Note explains that even those:

responsible for investigating alleged human rights violations are generally instructed to leave crime scenes untouched and not to attempt to substitute themselves for the relevant national/international authorities. This is particularly important as any action which is not professionally conducted may even tamper with criminal investigations and be ultimately detrimental to the effective prosecution of perpetrators of human rights violations.²

5. Military forces must plan for, train their personnel for, and devote resources to, a range of activities to ensure operational compliance with existing international legal obligations. For example, many law and order activities will require military forces to cooperate in the preservation of and the gathering of evidence relating to serious crimes such as genocide as well as in the development of procedures to deal with detainees.

24.02 All States are obliged to repress, and to provide penal sanctions for persons committing or ordering to be committed, serious crimes under international law.

¹ For the text of the Note see Australian Defence Force Military Law Centre, *Law and Military Operations in East Timor September 1999–February 2000* (Canberra: Australian Defence Force, 2002), Annex L. See also M.J. Kelly, T.L.H. McCormack, P. Muggleton, and B.M. Oswald, 'Legal aspects of Australia's involvement in the International Force for East Timor', 841 *IRRC* (2001), 101–139.

² *Ibid.* 3.

1. There are a range of serious international crimes regulated by various international legal regimes. These crimes include war crimes, genocide, crimes against humanity, torture, piracy, and human trafficking. Maintenance of law and order obligations in relation to these crimes accrue pursuant to treaties, customary international law, Security Council resolutions, and the statutes and jurisprudence of international courts and tribunals.

2. In relation to war crimes, the relevant legal regime has traditionally distinguished between 'grave breaches' of the Four Geneva Conventions of 1949 and of Additional Protocol I of 1977 and other serious violations of the laws and customs of war. In relation to the grave breaches regime, all States parties to the 1949 Conventions and all States parties to Additional Protocol I have two key obligations: to enact penal sanctions for those found guilty of grave breaches; and to proactively investigate those allegedly responsible for grave breaches and either extradite or prosecute such accused. The Four Geneva Conventions (GC) require States parties to undertake these measures to repress grave breaches³ and impose an additional obligation 'for the suppression of all acts contrary to the provisions of the... Convention'.⁴ Article 85 of Additional Protocol I (AP I) states that '[t]he provisions of the Conventions relating to the repression of breaches and grave breaches... shall apply to the repression of breaches and grave breaches of this Protocol'. It provides a supplemented list of grave breaches and confirms that all grave breaches shall be regarded as war crimes.⁵

3. In the English language, the meanings of 'repress' and 'suppress' are synonymous. The text of the Conventions and Additional Protocol I does not explicitly make any distinction between the two terms. In the First Geneva Convention the words 'Repression of Abuses and Infractions' are used as headline for Articles 49–54 which, *inter alia*, comprise the criminal prosecution of grave breaches and the 'suppression of all acts contrary to the provisions of the present Convention other than grave breaches'. According to the ICRC Commentary, '[g]rave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches'.⁶ The Commentary also states that:

[f]or breaches of the Protocol other than grave breaches the terms are the same as those used by the Conventions:... the Parties to the Protocol undertake to suppress them, which means that any 'repression' that might be undertaken by penal or disciplinary sanctions are

³ Art. 49 (2) GC I; Art. 50 (2) GC II; Art. 129 (2) GC III; Art. 146 (2) GC IV; Art. 85 (1) AP I.

⁴ Art. 49 (3) GC I; Art. 50 (3) GC II; Art. 129 (3) GC III; Art. 146 (3) GC IV; Art. 85 (1) AP I.

⁵ For a detailed discussion about the grave breaches regime see Y. Sandoz, J.-M. Henckaerts, K. Dörmann, R. Geiß, W. Ferdinandusse, K. Roberts, L. Moir, C. Kreß, R. O'Keefe, D. Fleck, and J. G. Stewart in 'Special Issue: The Grave Breaches Regime in the Geneva Conventions: A Reassessment Sixty Years On' 7 *Journal of International Criminal Justice* (2009), 653–877.

⁶ Y. Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), para. 3538.

24.02 the responsibility of the authority on which those committing such breaches depend or the Power to which they belong.⁷

4. In this discussion the Commentary focuses upon the prosecution of grave and other breaches of Additional Protocol I and not on any intended distinction between the two terms. However, the drafters of both the Conventions and the Protocol must have intended some distinction between the two terms since all five of these treaties suggest that the obligation in relation to grave breaches differs from the obligation in relation to all other breaches. The Commentary clearly adopts a view that 'repression' relates to ultimate penal sanctions. Perhaps then 'suppression' was intended to mean measures to stop the ongoing occurrence of the breaches. If this distinction is correct, then 'repression' could also incorporate 'suppression' but not vice versa.

5. Assuming that the suggested distinction is correct, there are important maintenance of law and order implications for military forces. In circumstances where a party to an international armed conflict fails to act to prevent violations of international humanitarian law when it has a duty to do so, forces should take measures to stop those violations of international humanitarian law. Military forces should not ignore breaches of international humanitarian law and should cooperate to report and where possible investigate and prevent ongoing breaches. The ability of military forces to report, investigate, and prevent ongoing breaches will depend on a variety of factors including the resources available to them and their level of training. At the very least, commanders should ensure that their personnel have the appropriate resources and training to report violations of international humanitarian law.

6. In this context military forces must also recognize that they will often be required to cooperate with other organizations such as the International Criminal Court, international humanitarian organizations such as the International Committee of the Red Cross, and the Office of the High Commissioner for Human Rights, and national law and order organizations to repress and suppress grave breaches of international humanitarian law by reporting and investigating allegations of such breaches. UN peacekeepers serving with the United Nations Mission in the Democratic Republic of the Congo (MONUC), for example, were mandated to 'cooperate with efforts to ensure that those responsible for serious violations of...international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations'.⁸ One mechanism that would be useful for military forces to utilize in circumstances where they know they must cooperate with other organizations in repressing and suppressing grave breaches of international humanitarian law is to develop a memorandum of understanding or agreement with those organizations so as to ensure that the appropriate modalities for reporting, investigating, and preventing grave breaches are implemented. Such an agreement was entered into in Timor Leste,

⁷ Ibid. 3539.

⁸ SC Res. 1565 (1 October 2004), para. 5 (g).

for example, between INTERFET and the Office of the High Commissioner for Human Rights.⁹ 24.02

7. In relation to war crimes, a term which goes beyond that of grave breaches of either the Geneva Conventions or Additional Protocol I in that it comprises all serious violations of international humanitarian law, all States have a right to vest universal jurisdiction in their domestic criminal courts. The ICRC Study on *Customary International Humanitarian Law* recognizes the existence of this right¹⁰ which is consistent with the statutes and jurisprudence of international and domestic criminal courts and tribunals.¹¹

8. Pursuant to Article 89 of Additional Protocol I States parties are obliged jointly or individually to cooperate with the United Nations in accordance with their obligations under the UN Charter, in situations of serious violations (including grave breaches) of the Protocol or of the four Geneva Conventions.

9. There are a number of other international crimes codified in specific treaty regimes the proscription of which has been widely recognized as having attained peremptory status, i.e. as norms of international law from which no derogation is permitted. These crimes have also been widely recognized as obligations owed *erga omnes*:

that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.¹²

10. The peremptory status and the *erga omnes* character of these crimes has been affirmed by the International Court of Justice, various international criminal courts and tribunals, and by the International Law Commission. The crimes in this category include, *inter alia*, genocide, torture, and piracy. In the context of the maintenance of law and order, military forces should take all reasonably available measures to prevent such crimes from occurring and to monitor, report, investigate, and to assist in the prosecution of those responsible where such crimes have occurred.

⁹ Australian Defence Force Military Law Centre, above n. 1, Annex L.

¹⁰ J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), Rule 157 on 'War Crimes'.

¹¹ Id. Vol. I, 604–607, referring to the legislation of Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Canada, Colombia, Costa Rica, Ecuador, El Salvador, Ethiopia, France, Germany, Luxembourg, New Zealand, Niger, Slovenia, Sweden, Switzerland, Tajikistan, United Kingdom, and United States, and to draft legislation of Lebanon, Sri Lanka, and Trinidad and Tobago. See also Art. 8 (2) (b) Rome Statute of the International Criminal Court (ICC Statute) of 17 July 1998, and the implementation of that provision by various States parties into their domestic criminal law.

¹² ICTY, *Prosecutor v Furundzija*, Case No. IT-95-17/I-T, Trial Chamber Judgment of 10 December 1998, para. 151.

24.02 11. *Genocide*. The customary international law prohibition of genocide was first codified in the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. That treaty definition has been replicated in the statutes of all international criminal courts and tribunals since—including in the Rome Statute for the International Criminal Court. Article 1 of the Genocide Convention obligates States parties in time of peace or in war to prevent and punish acts of genocide. The International Court of Justice has characterized the prohibition on genocide as 'assuredly' a peremptory norm of international law (*jus cogens*)¹³ and also as an obligation owed *erga omnes*.¹⁴ The Court has specifically considered the extent of the obligation in Article 1 of the Genocide Convention and found:

that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States Parties is rather to employ all means reasonably available to them so as to prevent genocide so far as possible... responsibility is, however, incurred if the State manifestly failed to take all measures to prevent genocide which were in its power, and which might have contributed to preventing genocide.¹⁵

12. *Torture*. The customary international law prohibition of torture is located in a range of international treaties including the Geneva Conventions, the Convention Against Torture, and the Rome Statute for the International Criminal Court. In the context of the maintenance of law and order on military operations the 1984 Convention Against Torture requires that States parties 'shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction'.¹⁶ Torture may never be justified in any circumstances including on the basis of conflict, internal political stability, or other public emergency.¹⁷ Furthermore States parties are prohibited from expelling, returning, or extraditing a person 'to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.¹⁸ In its judgment in the *Furundzija* case the Trial Chamber of the ICTY found that:

it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power

¹³ ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment on jurisdiction of 3 February 2006, ICJ Reports 2006, 6, 32, para. 64.

¹⁴ ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment of 5 February 1970, ICJ Reports 1970, 3, 34.

¹⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, 1, 154.

¹⁶ Art. 2 (1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

¹⁷ Art. 2 (2) Convention against Torture.

¹⁸ Art. 3 (1) Convention against Torture.

of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.¹⁹ 24.02

13. *Piracy.* The customary international law prohibition on piracy is codified in the UN Convention on the Law of the Sea in 1982. Article 100 of the Convention requires that States 'shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'. The Security Council in its Resolution 1816 (2008) reaffirmed that such repression included but was not limited 'to boarding, searching, and seizing vessels engaged in or suspected of engaging in acts of piracy, and to apprehend persons engaged in such acts with a view to such persons being prosecuted'.²⁰ The repression of piracy also extends to the sharing of information about 'acts of piracy and armed robbery... and to render assistance to vessels threatened by or under attack by pirates or armed robbers in accordance with relevant international law'.²¹ The International Law Commission has reaffirmed the *jus cogens* character of this prohibition.²² One recent example of precisely this kind of law and order function in relation to piracy has arisen in the context of the EU NAVFOR Somalia—Operation ATALANTA which is directed against piracy off the Somali Coast and is undertaken in fulfilment of the UN Security Council resolutions. According to the EU, military personnel involved in the operation can arrest, detain, and transfer persons who are suspected of having committed or who have committed acts of piracy or armed robbery in the areas they are present. They can seize the vessels of the pirates or the vessels captured following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board. The suspects can be prosecuted, as appropriate, by an EU Member State or by Kenya under the agreement signed with the EU on 6 March 2009 giving the Kenyan authorities the right to prosecute.²³

14. *Slavery.* The customary international law prohibition of slavery was first codified in the Convention to Suppress the Slave Trade and Slavery of 25 September 1926. Pursuant to Article 2 of the Convention States parties are obligated, in respect of the territories placed under their 'sovereignty, jurisdiction, protection, suzerainty or tutelage' to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms. In addition, pursuant to Article 4 of the Convention, States parties are obliged to 'give to one

¹⁹ *Furundzija* Judgment, above (n. 12), para. 156.

²⁰ SC Res. 1816 (2 June 2008), para. 1, on the situation in Somalia.

²¹ *Ibid.* 3.

²² See Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682 (2006), 166–205.

²³ European Union, European Security and Defence Policy, EU Naval Operation Against Piracy (EU NAVFOR Somalia – Operation ATALANTA) (2009), <http://www.consilium.europa.eu/uedocs/cmsUpload/090325FactsheetEUNAVFOR%20Somalia-version4_EN.pdf>.

24.02 another every assistance with the object of securing the abolition of slavery and the slave trade’.

15. *Transnational Crime and Human Trafficking.* The United Nations Convention Against Transnational Crime has been developed to ‘promote cooperation to prevent and combat transnational organised crime more effectively’.²⁴ Pursuant to Article 3 the Convention applies to the prevention, investigation, and prosecution of serious crimes,²⁵ participation in an organized criminal group,²⁶ laundering of proceeds of crime,²⁷ and corruption²⁸ where ‘the offence is transnational in nature and involves an organized criminal group’. The Convention also includes a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.²⁹ The Protocol includes measures to ‘prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognised human rights’.³⁰ A further purpose of the Protocol is to ‘promote cooperation among States Parties in order to meet’ the objectives of the Protocol.³¹ Both the Convention and the Protocol impose maintenance of law and order obligations in circumstances where military forces are confronted with organized criminal groups involved in the proscribed crimes. A recent example of military forces being authorized to deal with transnational crimes in cooperation with national authorities involved NATO’s announcement of the ISAF’s increased role in countering the illegal narcotics trade in Afghanistan.³²

16. Other maintenance of law and order obligations include the exchange of information aimed at identifying perpetrators and victims of the proscribed crimes,³³ and to strengthen border controls to detect and to prevent human trafficking.³⁴ In relation to identified victims of proscribed crimes, military forces are required to take appropriate measures within their means ‘to provide assistance and protection...in particular in cases of threat of retaliation or intimidation’.³⁵ States may have additional treaty obligations pursuant to relevant regional or bilateral treaties and agreements requiring them to cooperate in responding to particular criminal activities including in the context of military operations. One example

²⁴ Art. 1 United Nations Convention against Transnational Organized Crime of 15 November 2000, 2225 UNTS 209.

²⁵ For definition see Art. 2 (b) of the Convention.

²⁶ For a description of participation in an organized criminal group, see Art. 5 of the Convention.

²⁷ For a description of laundering the proceeds of crime, see Art 6. of the Convention.

²⁸ For the criminalization of corruption, see Art 8. of the Convention.

²⁹ UNGA Res. 55/25, UN GAOR, fifty-fifth Session, 62nd plenary meeting, Annex II (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children), Agenda Item 105, preamble, UN Doc A/RES/55/25 (8 January 2001) (‘Trafficking Protocol’).

³⁰ Ibid.

³¹ Ibid. Art. 2 (c).

³² See e.g. the announcement by NATO in October 2008: NATO, *NATO steps up counter-narcotics efforts in Afghanistan* (2008), <<http://www.nato.int/docu/update/2008/10-october/e1010b.html>>.

³³ See generally Arts. 5–9 United Nations Convention against Transnational Organized Crime of 15 November 2000, 2225 UNTS 209.

³⁴ Art. 11 of the Trafficking Protocol (above, n. 29).

³⁵ Art. 25 United Nations Convention against Transnational Organized Crime of 15 November 2000.

is the Council of Europe's Convention on Action Against Trafficking in Human Beings.³⁶

17. When engaged in operations where international crimes are alleged to have been committed, or are being committed, military commanders need to consider what specific powers they will authorize military personnel to exercise in relation to such crimes. For example, the commanders of European naval forces taking part in Operation ATALANTA to protect vessels from piracy and armed robbery in the Gulf of Aden and off the Somali Coast are authorized to 'employ the necessary measures, including the use of force to deter, prevent and intervene, in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where they are present'.³⁷

18. The ability of military forces to repress and suppress international crimes by means such as reporting on and investigation of the crimes, will depend on a variety of factors including the resources available to them and their level of training. At the very least, commanders should ensure that their personnel have the appropriate training to enable them to report such crimes. Effective training would ensure knowledge of the core elements of each category of serious international crime. Where military personnel are required to work with, or liaise with, other law enforcement organizations engaged in the prevention of such crimes, it is important that they develop appropriate mechanisms to ensure that the handling and treatment of international criminals are dealt with in accordance with the law pursuant to which the accused is likely to be dealt with. Such mechanisms might include the implementation of a memorandum of understanding to deal with such matters as handing physical custody of the accused, and any evidence relating to the alleged crime, over to the law enforcement organization. Thus, in relation to dealing with those accused of conducting piracy in the Gulf of Aden, the Governments of the United Kingdom and Kenya have entered into a memorandum of understanding which defines the 'modalities for transferring suspects held for conducting acts of piracy... from the custody of UK forces to Kenyan authorities'.³⁸

All parties to an armed conflict are obliged to respect and ensure respect for international humanitarian law.

24.03

1. Common Article 1 to the Four Geneva Conventions of 1949, Article 1 (1) of Protocol I Additional to the Geneva Conventions of 1977, and Article 4 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict impose treaty obligations on States parties to respect and ensure respect for the respective treaty regimes. The scope of application of Common Article 1

³⁶ Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005, OJ No L 197.

³⁷ Operation ATALANTA, above (n. 23). See also Chapter 20 above.

³⁸ See Kenyan Ministry of Foreign Affairs Press Report, *Kenya and the United Kingdom Sign a Memorandum of Understanding on Piracy Along the Coast of Somalia*, <http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=305&Itemid=62>.

24.03 extends also to respecting and ensuring respect for Common Article 3 in the context of non-international armed conflicts. The same obligation derives from Article 18 of the Hague Convention for the Protection of Cultural Property and Article 1 of the Second Protocol to that Convention, adopted on 26 May 1999.

2. According to the International Committee of the Red Cross, the obligation to respect and ensure respect for international humanitarian law has also become a norm of customary international law applicable in both international and non-international armed conflict and is not dependent upon reciprocity.³⁹ In addition to the evidence proffered by the ICRC in support of its rules, the obligation to respect and to ensure respect for international humanitarian law was reaffirmed during the 30th International Conference of the Red Cross and Red Crescent Movement in Geneva in 2007. The conference resolved that all States and parties to armed conflicts are obliged to 'respect and ensure respect for international humanitarian law in all circumstances'. The conference also stressed that all States have an obligation 'to refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to the degree possible, to prevent and end violations, either individually or through multilateral mechanisms, in accordance with international law'.⁴⁰

3. The ICJ in the *Nicaragua* case also recognized the general obligation articulated in Common Article 1 to the Geneva Conventions as reflective of a rule of customary international law. The Court stated that:

there is an obligation on States in terms of Common Article 1 to the Four Geneva Conventions 'to respect' the Conventions and even to 'ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.⁴¹

4. In delivering judgment in the *Kupreškić* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the obligation in Common Article 1 of the Four Geneva Conventions was an obligation owed *erga omnes* and not subject to reciprocity.⁴² The Trial Chamber cited the:

International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights)—they lay down obligations towards the international community as a whole, with the consequence that each and every member

³⁹ See ICRC, *Customary International Humanitarian Law* (above, n. 10), Rules 139, 140.

⁴⁰ ICRC, 30th International Conference of the Red Cross and Red Crescent Geneva 26–30 November 2007 (2007), <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p1108/\\$File/ICRC_002_1108.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p1108/$File/ICRC_002_1108.PDF)>.

⁴¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Judgment of 27 June 1986 (Merits), ICJ Reports 1986, 14, 114.

⁴² ICTY, *Prosecutor v Zoran Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber Judgment of 4 January 2000.

of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations.⁴³ **24.03**

5. States are required to maintain law and order in the context of military operations consistently with this legal obligation. States must, therefore, take the necessary steps to ensure that the development of doctrine, training regimes, directives and other forms of guidance, standard operating procedures, and enforcement mechanisms are effectively implemented so that military commanders and their subordinates are fully aware of the obligation to respect international humanitarian law.

6. Whereas Common Article 1 to the Geneva Conventions and also Article 1(1) of Additional Protocol I couch the obligation in general terms, some other treaty regimes are more explicit about the range of activities military forces may engage in to respect and ensure respect for the particular treaty regime. For example, Article 4 (3) of the Hague Convention for the Protection of Cultural Property obliges States parties to 'prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism against, cultural property'. This Article includes an indicative list of the sorts of activities which may need to be undertaken by military forces to ensure their own respect for the protection of cultural property.

7. In relation to respecting and ensuring respect for international humanitarian law in the context of non-international armed conflicts, the principal treaty obligation is Article 3 common to the four Geneva Conventions which provides a set of minimum standards of protection that all parties to a non-international armed conflict are expected to observe. These minimum standards of protection include the prohibitions against murder, torture, hostage taking, and outrages upon personal dignity.⁴⁴ These protections apply without adverse discrimination based upon, for example, race, sex, or religion.⁴⁵ Specifically, for example, in situations where military forces take detainees in non-international armed conflicts parties to the conflict are obliged to treat those detainees humanely and in accordance with the minimum standards of protection. There is an 'obligation to treat all persons in the power of a party... including persons deprived of their liberty' in accordance with the minimum standards. One effect of Common Article 3 is to ensure that when undertaking maintenance of law and order functions no person is outside the protections afforded by law.⁴⁶

8. Common Article 3 is recognized as reflective of a customary international law rule binding on all parties to a non-international armed conflict. Participants in the 30th International Conference of the Red Cross and Red Crescent Movement

⁴³ Ibid. para. 519. For further discussion concerning the doctrine of obligations owed *erga omnes* see I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008).

⁴⁴ Art. 3 common to GC I-IV.

⁴⁵ Ibid.

⁴⁶ ICRC, International Conference of the Red Cross and Red Crescent Geneva 26-30 November 2007 (above, n. 40), Resolution 3 (para. 3).

in Geneva in 2007 reaffirmed the binding nature of these minimum standards of protection.⁴⁷ The resolution from participating States at the 30th International Conference of the Red Cross and Red Crescent Movement in Geneva in 2007 that all States and parties to armed conflicts are obliged to 'respect and ensure respect for international humanitarian law in all circumstances' clearly demonstrates that the scope of the customary rule in non-international armed conflict extends beyond the minimum standards of protection in Common Article 3.

9. As affirmed by the Red Cross and Red Crescent Movement military commanders must 'refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to the degree possible, to prevent and end violations, either individually or through multilateral mechanisms, in accordance with international law'.⁴⁸ Here the obligation to ensure respect for international humanitarian law in non-international armed conflict is consistent with that to repress and suppress serious international crimes (outlined above). At the very least, commanders should ensure that their personnel have the appropriate training to enable them to report violations of the law and to have standard operating procedures to deal with any observation of such violations.

10. The obligation to ensure respect for international humanitarian law is not an absolute obligation. As participants in the 30th International Conference of the Red Cross and Red Crescent Movement affirmed, military commanders must 'refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to the degree possible, to prevent and end violations, either individually or through multilateral mechanisms, in accordance with international law'.⁴⁹ Here the obligation 'to ensure respect for international humanitarian law' is surely consistent with that to repress and suppress serious international crimes (outlined above). At the very least, commanders should ensure that their personnel have the appropriate training to enable them to report violations of the law and to have standard operating procedures to deal with any observation of such violations.

11. It is worth noting that any action taken to respect and to ensure respect for international humanitarian law 'should be in conformity with the Charter and international law'.⁵⁰ Consequently, consistent with general principles of international humanitarian law such as military necessity and humanity, any use of military force to 'ensure respect' for the various treaty regimes should only be a last resort unless the circumstances are such that no other option is available.

24.04 In situations of military occupation the occupant is obliged to take all measures within its power to restore, and as far as possible ensure,

⁴⁷ Ibid.

⁴⁸ Ibid. paras. 1–2.

⁴⁹ Ibid.

⁵⁰ See e.g. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004), ICJ Reports 2004, 136, Separate Opinion of Judge Higgins, para. 39.

public order and safety while respecting, unless absolutely prevented, the laws in force in the occupied country.

24.04

1. A specific obligation to restore and to maintain law and order in occupied territory arises pursuant to Article 43 of the 1907 Hague Regulations.⁵¹ As the:

authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country.⁵²

This specific obligation would extend to the occupying force preventing such activities as rioting, unlawful killing, violence against persons including sexual violence, looting, arson, etc.

2. The International Court of Justice in the *Case Concerning Armed Activities on the Territory of the Congo* (2005) determined that the obligations arising under Article 43 of the Hague Regulations are binding on Occupying Powers as rules of customary international law. In that case, the Congo argued that Uganda had violated various international legal obligations as a result of the activities of its armed forces on Congolese territory. Specifically the Court considered that the Uganda Peoples' Defence Forces (UPDF) 'took no action to prevent such [ethnic] conflicts in Ituri districts'.⁵³ The Court also relied upon findings presented to the Security Council that 'Ugandan Army commanders already present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternatively one side or the other according to their political and financial interests' and that 'UPDF troops stood by during the killings and failed to protect the civilians'.⁵⁴

3. The obligation in Article 43 of the Hague Regulations was further developed by Geneva Convention IV of 1949 which provides in relevant part that the maintenance of law and order may include subjecting the population of the occupied territory:

to provisions which are essential to enable the Occupying Power to fulfil its obligations . . . to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.⁵⁵

This provision acknowledges the entitlement of the Force to guarantee its own security as a fundamental prerequisite to the Force's own ability to maintain law and order. Likewise the Israeli High Court of Justice in *Beit Sourik Village Council v*

⁵¹ Hague Regulations (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulation respecting the Laws and Customs of War on Land of 18 October 1907.

⁵² Art. 43 HagueReg.

⁵³ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, ICJ Reports 2005, 168, 241.

⁵⁴ Ibid.

⁵⁵ Art. 64 GC IV.

24.04 *The Government of Israel and the Commander of IDF Forces in the West Bank* (2004) stated that:

the law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs and interests of the local population.⁵⁶

4. One particular example of the balance between the security needs of the occupying forces and the rights, needs, and interests of the local population arises in the requirements for dealing with those suspected of activities hostile to the security of the occupier. Article 5 of Geneva Convention IV stipulates that such persons shall be treated humanely and 'in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention'. A further guarantee of the rights of 'protected persons' is provided for in Article 70 of Geneva Convention IV which prohibits the Occupying Power from arresting, prosecuting, or convicting such persons 'for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war'.

5. In relation to the humane treatment of protected persons, Occupying Powers are obliged to ensure that such persons are protected 'against all acts of violence or threats thereof and against insults and public curiosity'. Women 'shall be especially protected against any attack on their honour in particular against rape, enforced prostitution, or any form of indecent assault'. The obligations on Occupying Powers to treat protected persons humanely, therefore, require commanders to ensure that they uphold the highest standards of discipline on their own troops and train their personnel on the obligation of humane treatment. Concerning the obligation to protect individuals from all acts of violence or threats thereof, commanders should plan for the creation of zones of protection including non-defended localities and demilitarized zones.⁵⁷ Other strategies for the protection of individuals may include the establishment of curfews and the implementation of security patrols where law and order is threatened or has broken down.

6. In maintaining law and order in situations of military occupation, there is a general prohibition on amending the penal laws of the occupied territory.⁵⁸ This general prohibition is limited to circumstances where the penal law of the occupied territory 'constitutes a threat to its [the Occupying Power's] security or an obstacle to the application of the present Convention'. The requirement to respect local laws is qualified not only by the security needs of the Occupying Power but also where local laws are at variance with established international human rights law

⁵⁶ Isr Supreme Court, *Beit Sourik village Council v The Government of Israel and the Commander of IDF Forces in the West Bank* ('separation fence in the area of Judea and Samaria'), 2004 HCJ 2056/04, Judgment of 30 June 2004, para. 34.

⁵⁸ Art. 64 GCIV.

⁵⁷ Arts. 59 and 60 GCIV.

standards. The approach that maximizes the protection of the occupied population should be given priority.

7. By implication, pursuant to Article 27 of Geneva Convention IV occupying forces may need to engage in the maintenance of law and order to comply with the requirement to 'take such measures of control and security in regard to protected persons as may be necessary'.⁵⁹ This requirement may include assigning residence or interning protected persons 'for imperative reasons of security'.⁶⁰

8. There is also an obligation that occupying military forces 'shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property'.⁶¹ Military forces are required to 'prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism against, cultural property'.⁶²

9. The law of occupation, therefore, has a considerable impact on planning and conducting maintenance of law and order aspects of military operations. For example, commanders will need to consider the extent to which rules of engagement will need to authorize the use of force in dealing with various levels of criminals such as looters and those carrying out petty theft. Commanders will also need to identify how best to train their subordinates to understand the legal system of the occupied territory so that people are not detained arbitrarily or unlawfully. In relation to taking and dealing with internees, commanders will also need to ensure that adequate resources are devoted to accommodating any internees that might be detained for imperative reasons of security.

10. Even in situations where the law of occupation does not apply *de jure*, it may nonetheless be a useful body of law to use by analogy when maintaining law and order because its rules and principles provide useful guidance for military forces dealing with the civilian population when law and order has broken down. The International Force in Timor Leste, for example, used the law of occupation to establish its interim justice system.⁶³ The Law of Military Occupation did not apply to that particular operation because Indonesia had consented to the deployment of INTERFET.

Where military operations are conducted pursuant to Security Council authorization and the Security Council mandate specifies a maintenance of law and order obligation, the military force is obliged to implement the mandate and to act consistently with it.

24.05

⁵⁹ Art. 27 (4) GC IV.

⁶⁰ Art. 78 GC IV.

⁶¹ Art. 5 (1) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

⁶² Art. 4 (3) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

⁶³ For further detail see B.M. Oswald, 'The INTERFET Detainee Management Unit in East Timor' 3 *YIHL* (2002), 347-361.

- 24.05 1. Article 25 (1) of the UN Charter requires Member States of the UN to carry out the decisions of the Security Council. Consequently, whenever the Council mandates the maintenance of law and order on peace operations, contributing States should use all means reasonably available to them to maintain law and order so far as is possible to implement the mandate. Sometimes the mandate is specific. In its authorization of the deployment of INTERFET to East Timor in 1999, for example, the Council mandated the Force 'to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations', and authorizes the States participating in the multinational force 'to take all necessary measures to fulfil this mandate'.⁶⁴
2. On other occasions the Council mandates the Force to cooperate with national authorities in the maintenance of law and order. For example, in Resolution 1794 the Council tasked MONUC to cooperate with Congolese authorities to bring 'those responsible for serious violations of human rights and international humanitarian law ... to justice'.⁶⁵
3. There are also other circumstances in which the Council authorizes peace operations to undertake a range of functions which, by implication, require the maintenance of law and order by peacekeepers. For example, the Council has mandated forces to 'protect civilians under imminent threat of physical violence'⁶⁶ and to 'provide security and protection of displaced persons, refugees and civilians at risk'.⁶⁷ The Security Council has also encouraged multinational forces to assist local authorities to deal with specific crimes such as drug trafficking. The International Security Force (ISAF) in Afghanistan, for example, has been encouraged to 'effectively support, within its designated responsibilities, Afghan-led sustained efforts to address, in cooperation with relevant international and regional actors, the threat posed by the illicit production, of and trafficking in drugs'.⁶⁸
4. In such circumstances, military personnel should take all reasonable measures to fulfil their law and order functions. Such measures might include intelligence sharing and the conduct of efficient public information campaigns, training local authorities and providing resources to them to ensure that they are capable of dealing with law and order matters in accordance with generally accepted international standards, developing appropriate rules of engagement and directives so as to ensure that members of the military force know the extent of their law and order powers when dealing with the nationals of the Host State, and having sufficient resources to deal with any persons taken into custody.

⁶⁴ SC Res. 1264 (15 September 1999), para. 3.

⁶⁵ SC Res. 1794 (21 December 2007), para. 16.

⁶⁶ *Ibid.* para. 8.

⁶⁷ SC Res. 918 (17 May 1994), para. 3 (a), on the expansion of the mandate of the UN Assistance Mission for Rwanda and imposition of an arms embargo on Rwanda.

⁶⁸ SC Res. 1833 (22 September 2008), Preamble.

5. From time to time the Security Council adopts thematic resolutions which impact upon the maintenance of law and order during military operations. For example, in Resolution 1888 (2009) dealing with Women, Peace and Security the Security Council demanded: 24.05

that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and children, from all forms of sexual violence, including measures such as, *inter alia*, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence and vetting candidates for national armies and security forces to ensure the exclusion of those associated with serious violations of international humanitarian and human rights law, including sexual violence.⁶⁹

This particular provision creates maintenance of law and order obligations on military forces to take steps including disciplinary measures and training. In addition, where military forces are responsible for training national armies and security forces there is a requirement to ensure vetting of prospective personnel to exclude those associated with serious violations of international humanitarian law.

6. In military operations established not by a Security Council resolution but pursuant to bilateral or multilateral agreements, obligations for the maintenance of law and order can be mandated specifically and by implication. The Agreement between the Solomon Islands and various Pacific Forum contributing nations to the Regional Assistance Mission to the Solomon Islands (RAMSI) specifies, for example, the following:

The Assisting Countries may deploy a visiting Contingent of police forces, armed forces and other personnel to Solomon Islands to assist in the provision of security and safety to persons and property; maintain supplies and services essential to the life of the Solomon Islands community; prevent and suppress violence, intimidation and crime; support and develop Solomon Islands institutions; and generally to assist in the maintenance of law and order in Solomon Islands ... Members of the Participating Armed Forces and Participating Police Force and other members of the visiting Contingent appointed to the Solomon Islands Police Force may detain and disarm any person or persons who are committing or attempting to commit offences in relation to person or property.⁷⁰

7. One example of assistance in the maintenance of law and order arose by implication from the Dayton Accord. The Commander of the multinational military Implementation Force (IFOR) was authorized to undertake all that was 'necessary and proper, including the use of military force, to protect IFOR and to carry

⁶⁹ SC Res. 1888 (30 September 2009), para. 3. See below, Chapter 28 'Prevention and Repression of Sexual Exploitation and Abuse in the Context of Peace Operations'.

⁷⁰ Arts. 2 and 6 Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operation and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security of 30 June 2003 (2003 *Australian Treaty Series* 17).

out responsibilities' and this mandate was interpreted to include the disarming of individuals carrying military weapons within the agreed Zone of Separation.⁷¹

24.06 In military operations there is an obligation to take all feasible measures to ensure that children under 15 years of age do not take a direct part in hostilities.

1. Article 77 (2) of Additional Protocol I of 1977 obligates all States parties to undertake all feasible measures to ensure that children under the age of 15 years do not take a direct part in armed hostilities. The obligation includes a prohibition on the recruitment of such children into the armed forces of States parties. Article 8 (2) of the Rome Statute of the International Criminal Court reinforces the prohibition in Article 77 (2) of AP I by including the war crime of 'conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate in hostilities' in either international or non-international armed conflicts.⁷² The Optional Protocol on the Involvement of Children in Armed Conflict to the UN Convention on the Rights of the Child raises the age limit for the prohibition on the involvement of children from 15 years to 18 years. While the 15-year age limitation is accepted as a norm of customary international law (according to the ICRC Customary International Humanitarian Law Study)⁷³ the same cannot be said for the increased age limit of 18 years. At best, it may be argued that the Optional Protocol represents *de lege ferenda* on this question of age. One consequence of the Optional Protocol is that armed groups 'that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'.⁷⁴ This prohibition requires States parties to 'take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practice'.⁷⁵

2. The obligation not to involve children under the age of 15 years in hostilities extends to recruitment, conscription, and use of such child soldiers.⁷⁶ In the case before the Special Court for Sierra Leone against the co-accused Sesay, Kallon, and Gbao, the court reaffirmed that:

the offence of recruitment of child soldiers by way of conscripting or enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities constitutes a crime under customary international law which entailed individual criminal responsibility prior to the time frame of the Indictment.⁷⁷

⁷¹ Art. 6 (5) and Art. 4 (2) General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995 (35 *ILM* (1996), 89. ⁷² Arts. 8 (2) (b) (xxvi) and 8 (2) (e) (vii) ICC Statute.

⁷³ See CIHL, above (n. 10), Rule 136.

⁷⁴ Art. 4 (1) Optional Protocol to Convention on the Rights of the Child of 20 November 1989.

⁷⁵ Art. 4 (2) Optional Protocol to Convention on the Rights of the Child.

⁷⁶ See ICC, *Arrest Warrant of 10 February 2006 (Prosecutor v Thomas Lubanga Dyilo)* (Pre-Trial Chamber I) ICC-01/04-01/06.

⁷⁷ Special Court for Sierra Leone, *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Chamber) Case No. SCSL-04-15-T (8 April 2009), para. 184.

3. The implications of these treaty (and customary law) obligations for the maintenance of law and order on military operations has been considered by the International Court of Justice in the *Congo* case. The Court identified a specific obligation to 'prevent the recruitment of child soldiers in areas under' the control of military forces (the UPDF in that particular case)⁷⁸ and that in that particular case the UN Secretary General reported that 'local UPDF soldiers in and around Bunia in Ituri district have failed to prevent the fresh recruitment or re-recruitment of children' as child soldiers.⁷⁹ Armed forces deployed on military operations where child soldiers have been recruited and are being used will need to consider what measures can be implemented to stop these practices and to assist in bringing those responsible for them to account. 24.06
4. There are at least two direct operational consequences that arise from the requirement to take all feasible measures to ensure that children do not take a direct part in hostilities. First, commanders need to ensure that appropriate directives are issued to their subordinates to ensure that children who may be considered to be taking a direct part in hostilities, or have taken a direct part in hostilities, are treated in accordance with general principles of international law such as, for example, 'the best interests of the child shall be a primary consideration'.⁸⁰ Second, commanders must have appropriate mechanisms in place to ensure that any child soldiers that they have in their control are handed over to appropriate international or national authorities. Thus commanders will need to ensure that there are appropriate modalities in place to facilitate the efficient handover of child soldiers to authorities that are able to protect the fundamental rights of such children.

⁷⁸ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment), ICJ Reports 2005, 168, 241.

⁷⁹ Ibid.

⁸⁰ Art. 3 Convention on the Rights of the Child of 20 November 1989.



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